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Cafa's Impact on Class Action Lawyers Symposium: Fairness to Whom - Perspectives on the Class Action Fairness Act of 2005

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CAFA'S IMPACT ON CLASS ACTION LAWYERS

HOWARD M. ERICHSON[†]

INTRODUCTION

Procedural reforms alter litigation options directly, but they alter the litigation landscape in more ways than reformers anticipate. Three years ago, Congress dramatically expanded federal jurisdiction with the Class Action Fairness Act of 2005 (CAFA),¹ a statute drafted with no love for class action plaintiffs' lawyers. Those lawyers have adapted to the statute, in part, by altering their forum-selection and claim-selection strategies. Analysis of these adaptations offers an emerging picture of the statute's impact on class actions and class action lawyers. CAFA's impact on the class action bar deserves particular attention because, although the statute speaks the language of subject matter jurisdiction, its message of mistrust was aimed squarely at the lawyers.

CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers' inventing lawsuits and manipulating the system to enrich themselves at others' expense. Politicians and other CAFA proponents called class action lawyers self-interested,² un-

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¹ Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

² See, e.g., Remarks on Signing the Class Action Fairness Act of 2005, 41 PUB. PAPERS 265, 266 (Feb. 18, 2005) (reproducing President Bush's remarks that class actions can be "manipulated for personal gain," quoting an editorial calling class actions "an extortion racket"); 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (supporting CAFA in order to "keep class members from being used by the lawyers they never hired to engage in litigation they do not know about or to extort money they will never see"); 151 CONG. REC. S1007 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch) (describing the "intolerable practice" of lawyers gaming the system and stating that "many believe the only interests served by these settlements are those of the class counsel"); Chuck Grassley, *Should Congress Step in To Reform the Current System of Class-Action Lawsuits?*, INSIGHT ON THE NEWS, Nov. 12, 2002, at 46, 46 (describing the need for CAFA because of class actions in which "the plaintiffs' lawyers made piles of cash, while the plaintiffs received little of anything").

scrupulous,³ unprincipled,⁴ and unaccountable.⁵ When past reforms targeted class action lawyers, however, some of those lawyers made out quite well, proving that as lawyers adapt, the fittest may not only survive but thrive.

Recent class action reforms—the Private Securities Litigation Reform Act of 1995 (PSLRA),⁶ the Supreme Court’s 1997 and 1999 settlement class action decisions in *Amchem Products, Inc. v. Windsor*⁷ and *Ortiz v. Fibreboard Corp.*,⁸ and the Rule 23 amendments of 2003⁹—have addressed a variety of legal issues but share a common theme of mistrust. Each sought to tighten controls on class action lawyers to reduce abuse in light of problems of agency, autonomy, and leverage. Add to this picture the criminal prosecution of the Milberg Weiss firm and several of its leading partners for payments to class representatives in securities class actions,¹⁰ the criminal prosecution of plaintiffs’ attorney Louis Robles for misappropriation of settlement funds,¹¹ a simi-

³ See, e.g., Editorial, *Reforming Class-Action Suits*, CHRISTIAN SCI. MONITOR, Apr. 17, 2003, at 10 (“Class-action suits have also become an ATM for unscrupulous lawyers, who win millions of dollars for themselves but sometimes leave clients empty-handed.”); Jennifer Garrett, *Class Actions Get a Bad Reputation*, CORP. REP. WIS., Nov. 2004, at 26, 26 (“Unscrupulous lawyers use class actions to seek windfall payouts for their work with little redress for their clients.”); Alan Levins, Op-Ed., *Law Needed To Stop Abuses by Unethical Class-Action Attorneys*, S.F. CHRON., Aug. 10, 1999, at A19 (“These unscrupulous individuals treat the suits as business ventures, manipulating the system to increase their own material wealth, often at the expense of their clients and other class-action members.”); Tom McCann, *Class Actions: The Battle Heats Up*, CHI. LAW., Apr. 2004, at 8, 60 (“You have class members getting dollar-off coupons while their lawyers reap millions. You can see how such a system can be corrupted by unscrupulous trial lawyers.” (quoting tort reform advocate Victor Schwartz)).

⁴ See, e.g., Levins, *supra* note 3 (urging passage of CAFA to “put a halt to some of the more extreme abuses by unprincipled plaintiffs’ attorneys”).

⁵ See, e.g., Editorial, *Actions Without Class*, WASH. POST, Aug. 27, 2001, at A14 (“[T]he incentive structure of modern class-action litigation encourages bad behavior by lawyers who are accountable to nobody.”).

⁶ Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

⁷ 521 U.S. 591 (1997).

⁸ 527 U.S. 815 (1999).

⁹ FED. R. CIV. P. 23(c), (e), (g), (h) (as amended 2003). An earlier round of proposed Rule 23 amendments resulted only in the 1998 adoption of the interlocutory appeal provision of Rule 23(f). FED. R. CIV. P. 23(f) (as amended 1998).

¹⁰ See Nathan Koppel, *In Role Reversal, Melvyn Weiss Is Indicted*, WALL ST. J., Sept. 21, 2007, at A11; Michael Parrish, *Ex-Partner at Law Firm Pleads Guilty in Kickback Case*, N.Y. TIMES, Oct. 10, 2007, <http://www.nytimes.com> (search archive for title).

¹¹ See Jay Weaver, *Ex-Top Lawyer Robles Faces 15 Years in Jail*, MIAMI HERALD, Sept. 18, 2007, available at 2007 WLNR 18260565. The criminal matter involved Robles’ handling of nonclass settlements for thousands of asbestos plaintiffs, rather than a class action, although Robles is known as a class action lawyer. See, e.g., Julie Kay, *Along for*

lar prosecution of several Kentucky mass tort lawyers,¹² and a spate of civil lawsuits against mass litigators claiming that they breached their duties to their clients,¹³ and the environment of mistrust of mass litigators becomes even clearer. Even the Supreme Court's 2007 pleading decision in *Bell Atlantic v. Twombly*¹⁴ can be viewed, in part, as an effort to prevent lawyers from filing questionable class actions.¹⁵

While these developments have profoundly affected class litigation, they have left largely untouched the basic class certification standard of Rule 23(a) and 23(b).¹⁶ Rather than alter the basic test for the legitimacy of a class action, CAFA and the other reforms tightened procedural protections to prevent abuse of the class action device. They regulated the selection of class counsel, tightened control of

the Ride, DAILY BUS. REV. (Fla.), Oct. 20, 2000, at 10 ("While some Miami lawyers are just getting into class actions, Louis Robles has specialized in them since 1974. He's raked in millions in fees by finding his own class-action lawsuits and getting in on the ground floor, not by following the pack and then fighting to become lead counsel.").

¹² See Andrew Wolfson, *Lawyers in Diet-Drug Case Are Indicted*, COURIER-JOURNAL (Louisville, Ky.), June 15, 2007, at 1A (reporting the indictment of mass tort lawyers Shirley Cunningham, William Gallion, and Melbourne Mills, Jr.).

¹³ See, e.g., Samuel Maull, *Trial To Decide if Law Firm Fattened Fen-Phen Profit*, STAR-LEDGER (Newark, N.J.), Mar. 30, 2007, at 64; Shelly Whitehead, *Fen-Phen Suit Heads to Mediation*, KY. POST, Apr. 24, 2007, at 1A.

¹⁴ 127 S. Ct. 1955 (2007).

¹⁵ In *Twombly*, the Court emphasized the size of the class action as one of the reasons to demand a well-supported complaint before permitting the plaintiffs to obtain expensive discovery:

That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

Id. at 1967.

¹⁶ The interpretation of the class certification standard continues to develop, of course, and courts generally have become stingier about certifying class actions. For a useful analysis of recent developments on class certification, see John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, 8 Class Action Litig. Rep. (BNA) S-787 (Oct. 26, 2007). Similarly, it is an exaggeration to say that *Amchem* and *Ortiz* have left untouched the class certification standard. One cannot understand the current meaning of Rule 23(a)(4) adequacy or Rule 23(b)(3) predominance without *Amchem*, nor can one understand the current approach to Rule 23(b)(1)(B) limited funds without *Ortiz*. The Supreme Court treated those cases, however, as applications of existing class certification standards, rather than as a break. To the extent those cases broke new ground, it was in their frank recognition of the dangers of trusting class counsel in settlement class actions.

class counsel fees, toughened pleading requirements, reduced class counsel's ability to dictate the choice of forum, facilitated interlocutory appeals, and impeded settlement class actions and coupon settlements. Taken together, the overall message of recent developments seems to be, "in theory, class actions are fine, but in practice, don't trust the class action lawyers."

The history of recent class action reforms suggests that even if changes are driven by wariness about class action lawyers, the adjustments may have the unintended consequence of strengthening the position of certain of those lawyers. Indeed, data on post-CAFA class action filings suggest that, like the 1995 securities litigation statute, CAFA has shifted class action practice in ways that will strengthen the upper tier of the plaintiffs' class action bar.

Part I of this Article shows the extent to which CAFA was motivated by a mistrust of class action lawyers. Part II places CAFA in the context of other recent class action developments. Similar feelings of mistrust motivated many of those developments, yet the changes—particularly those brought about by the PSLRA—brought the unintended consequence of enhancing the power of the strongest class action law firms. Part III looks at data on post-CAFA shifts in class action practice and the effect of those shifts on the class action bar. CAFA has affected not only the division of labor between state and federal courts, but also horizontal forum selection among federal courts and class action claim selection. These changes, taken together, bode well for the same upper echelon of firms that profited from the unintentional impact of prior class action reform.

I. CAFA AND THE MISTRUSTED CLASS ACTION LAWYER

"The people in democracy do not distrust lawyers," Alexis de Tocqueville wrote, "because they know that their interest is to serve the people's cause; they listen to them without anger, because they do not suppose them to have ulterior motives."¹⁷ Tocqueville never saw a class action.

The combination of big money and clientlessness breeds mistrust. CAFA's proponents successfully portrayed class action lawyers as opportunistic aggregators who get rich on litigation of their own making, with little control by clients, little remedy for each client, and few clients

¹⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 254 (Harvey C. Mansfield & Delba Winthrop trans., Univ. Chi. Press 2000) (1835).

who even care enough to sue. At its core CAFA addresses subject matter jurisdiction, and to the extent federal jurisdiction statutes involve mistrust, they ordinarily involve mistrust of state judges. Diversity jurisdiction grew out of a mistrust of state court judges to administer and adjudicate cases without local bias.¹⁸ Federal question jurisdiction grew out of a mistrust of state court judges to pay sufficient attention to federal law claims.¹⁹ The Class Action Fairness Act, too, was driven in significant part by mistrust of state court judges,²⁰ but unlike other jurisdictional statutes, CAFA also centrally involved mistrust of lawyers: untrustworthy lawyers necessitate monitors; untrustworthy monitors necessitate the empowerment of alternative monitors.²¹

CAFA dramatically expanded federal subject matter jurisdiction over state law class actions. Before CAFA, if plaintiffs' counsel preferred state court, it was easy to avoid federal court simply by choosing class representatives to destroy complete diversity,²² by naming a

¹⁸ "It is the generally accepted view that diversity jurisdiction was established to provide access to a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states." 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 102App.03[1] (3d ed. 1997) (citing *Burgess v. Seligman*, 107 U.S. 20, 34 (1883)); see also *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) ("It was believed that, consciously or otherwise, the courts of a state may favor their own citizens.").

¹⁹ "The primary purpose of the 1875 grant of federal question jurisdiction is to ensure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights." 15 MOORE ET AL., *supra* note 18, § 103.03 (citing *Hunter v. United Van Lines*, 746 F.2d 635, 647 (9th Cir. 1984); *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968)).

²⁰ See, e.g., Remarks on Signing the Class Action Fairness Act of 2005, *supra* note 2, at 266 (providing President Bush's remarks on the need for the legislation so business defendants can avoid "sympathetic local courts" and "friendly local venues"); AM. TORT REFORM ASS'N, *JUDICIAL HELLHOLES 2004*, at 15 (2004) [hereinafter *ATRA 2004 REPORT*], available at <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf> ("For some reason, these class action lawyers do not want to go to Federal courts. Now, why is that? Because they can forum shop into Madison County, IL, where they get judges and jurors to hammer the defendants with outrageous verdicts that benefit basically only the attorneys." (quoting Sen. Orrin Hatch)).

²¹ CAFA does more than simply expand federal jurisdiction, and its other provisions drive home the message of mistrust. The statute constrains the use of coupon settlements, reflecting the expectation that lawyers cannot be trusted to settle in the class's best interests. It also requires notice of proposed class settlements to government authorities, on the theory that the class's lawyers cannot be trusted to present the full story to the court, and that additional monitors are needed to protect class members' interests.

²² See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921) (requiring, for diversity jurisdiction in a class action, complete diversity of citizenship between the named class representatives and the defendants).

nondiverse²³ or in-state defendant,²⁴ or by asserting individual claims below \$75,000.²⁵ CAFA permits federal jurisdiction over class actions based on minimal diversity and an aggregate amount in controversy of five million dollars.²⁶ Moreover, it allows removal by any defendant, even an in-state defendant.²⁷ The statute includes exceptions that purport to keep local controversies in state court,²⁸ but those exceptions are quite narrow.²⁹ By replacing the complete diversity requirement with minimal diversity, by eliminating the in-state defendant exception and the unanimity requirement for removal, and by allowing aggregation of the amount in controversy, CAFA ensured that nearly all large-scale class actions could be filed in or removed to federal court.

President Bush, signing CAFA in February 2005, emphasized his mistrust of class action lawyers. He began by reaffirming, at least in lip service, the importance of legitimate class actions: "Class actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrongdoing to merge their claims into a single lawsuit. When used properly, class actions make the legal system more efficient and help guarantee that injured people receive proper compensation."³⁰ He turned quickly, however, to his main point: "Class actions can also be manipulated for personal gain."³¹ Quoting an editorial that called class actions "an extortion racket," the President praised Congress for addressing the problem of class actions in which

²³ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting the diversity jurisdiction statute to require complete diversity of citizenship).

²⁴ See 28 U.S.C. § 1441(b) (2000) (disallowing removal based on diversity jurisdiction if any defendant is a citizen of the forum state).

²⁵ See *id.* § 1332 (authorizing diversity jurisdiction only for claims in which the amount in controversy exceeds \$75,000); *Snyder v. Harris*, 394 U.S. 332, 338 (1969) (requiring each class member to meet the amount-in-controversy requirement, rather than allowing aggregation of damages). In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 559 (2005), the Supreme Court interpreted the supplemental jurisdiction statute, 28 U.S.C. § 1367, to permit federal jurisdiction over class actions in which at least one member meets the amount-in-controversy requirement, overruling *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). While the *Exxon Mobil* decision expands diversity jurisdiction over certain class actions, it does not reach class actions in which no class member's claim exceeds \$75,000, nor does it alter the complete diversity requirement.

²⁶ 28 U.S.C. § 1332(d) (2), (6) (Supp. V 2005).

²⁷ *Id.* § 1453(b).

²⁸ *Id.* § 1332(d) (3)–(4).

²⁹ See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1536 (2008).

³⁰ Remarks on Signing the Class Action Fairness Act of 2005, *supra* note 2, at 265–66.

³¹ *Id.* at 266.

"lawyers went home with huge payouts, while the plaintiffs ended up with coupons worth only a few dollars."³²

The President was echoing Congress. Although the statutory language stopped short of "extortion racket," the congressional findings in CAFA made the same point: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value."³³

Individual legislators were blunter. Senator Orrin Hatch urged passage of the bill as a way to curb the "intolerable practice" of lawyers' gaming the system for their own advantage: "[L]et me explain just how this game works. It starts with a few class action attorneys sitting around a table, thinking of an idea for a class action lawsuit."³⁴ Hatch proceeded to describe the search for a deep-pocket defendant, the naming of a lead plaintiff to avoid diversity jurisdiction, the search for a compliant judge, and ultimately, the settlement of the action in the lawyers' interests:

The real kicker is this: in some cases, many believe the only interests served by these settlements are those of the class counsel. Again, they will walk away with hundreds of thousands and sometimes millions of dollars. And what do the class members recover? Perhaps a worthless coupon.

There you have it, a successful gaming of the State tort system by the class action lawyers.

This is an intolerable practice and one that the Class Action Fairness Act will curb.³⁵

Representative Chris Cannon, speaking in favor of the House bill, echoed Hatch's concerns and called the game "Class Action Monopoly."³⁶ Senator Chuck Grassley wrote that "increasingly these days,

³² *Id.*

³³ CAFA, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4 (2005).

³⁴ 151 CONG. REC. S1007 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch).

³⁵ *Id.*

³⁶ 151 CONG. REC. H734 (daily ed. Feb. 17, 2005) (statement of Rep. Cannon). Cannon spoke of "the game the class action lawyers play here and how they go about abusing the court systems." *Id.* Like Hatch, Cannon emphasized the potential for abuse in essentially clientless litigation:

The first thing they do is come up with an idea for a lawsuit. And then they find a named plaintiff. It does not have to be someone who is actually injured in the process. All the lawyer really needs is an idea for a lawsuit and potential defendants who have deep pockets.

class action lawsuits are more likely to enrich the lawyers filing them than compensate the consumers who've been harmed."³⁷

During the years when CAFA was making its way through legislative channels, editorials, op-eds, and articles appeared in papers around the country explaining the need for the statute in terms of mistrust of both class action lawyers and state court judges. Back when the bill was known as the Class Action Fairness Act of 1999, an op-ed in the *San Francisco Chronicle* explained the problem as follows:

Today, the driving force behind many class-action suits is the plaintiffs' attorneys, rather than the plaintiffs themselves. These unscrupulous individuals treat the suits as business ventures, manipulating the system to increase their own material wealth, often at the expense of their clients and other class-action members. Such manipulation results in a denial of due process to defendants, often corporations.³⁸

The op-ed extolled the bill as a solution to these problems. "The purpose of the law is to reform the current system and put a halt to some of the more extreme abuses by unprincipled plaintiffs' attorneys."³⁹

The *Washington Post*, urging passage of CAFA, editorialized in 2001 that "class actions are unusually prone to abuse, and the incentive structure of modern class-action litigation encourages bad behavior by lawyers who are accountable to nobody."⁴⁰ The problem, according to the editorial, is the clientlessness of class action practice. "In many class actions . . . the clients are something of a fiction of self-appointed lawyers Essentially, the lawyers are representing them-

Id. Representative Sensenbrenner supported the inclusion of a consumer bill of rights to "keep class members from being used by the lawyers they never hired to engage in litigation they do not know about or to extort money they will never see." 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

³⁷ Grassley, *supra* note 2, at 46. He drives the point home by describing several examples of "consumer-unfriendly" class actions, concluding that, "[r]egardless of wrongdoing, such cases have one constant: the plaintiffs' lawyers made piles of cash, while the plaintiffs received little of anything." Grassley linked the problem of unscrupulous lawyers to that of untrustworthy judges, stating that such lawyers "look for courts that are quick to certify a class without adequately considering the interests of all class members, or courts that aren't careful in evaluating whether the proposed class meets the required criteria. Those state courts also are more likely to rubber-stamp settlement proposals without scrutinizing them for fairness." *Id.*

³⁸ Levins, *supra* note 3.

³⁹ *Id.*; see also Dan Kelly, *Class Action Suits Enrich Lawyers While Consumers Get Pennies*, READING EAGLE (Pa.), Dec. 31, 2003, at A1 ("Lawyers abuse the class-action system by bringing hundreds of national class actions in state courts that have little or no connection to the controversy, the official said." (quoting an official of the defense lobby Class Action Coalition)).

⁴⁰ Editorial, *supra* note 5.

selves. Having invented a client, the lawyers also get to choose a court.”⁴¹ The *Washington Post* echoed the theme a year later: “In normal litigation, aggrieved clients hire lawyers to represent them. In many class actions, by contrast, lawyers appoint themselves to represent large numbers of people who may have no beef with the company they find themselves suing, and who may not even learn they are suing anyone.”⁴² Again, the paper voiced the concern that class action lawyers create and pursue the litigation for their own benefit rather than for the benefit of class members: “At settlement time, the lawyers cash in, while the ‘clients’ get coupons for product upgrades.”⁴³

Mistrust of class action lawyers, combined with mistrust of the state court judges charged with monitoring them (or at least of the state court judges whom class action lawyers were thought most likely to seek out), propelled the expansion of federal jurisdiction over class actions. CAFA’s supporters linked the problem of “unscrupulous lawyers” with the problem of “renegade state court” judges.⁴⁴

Proponents of CAFA, even as they expressed their doubts about the trustworthiness of the plaintiffs’ class action bar, routinely pointed out that they objected only to abuse of class actions by unscrupulous lawyers, not the class action device itself.⁴⁵ Some plaintiffs’ class action attorneys nonetheless perceived the legislation as an attack on their

⁴¹ *Id.*

⁴² Editorial, *Restoring Class to Class Actions*, WASH. POST, Mar. 9, 2002, at A22.

⁴³ *Id.*

⁴⁴ See Garrett, *supra* note 3, at 26 (“Unscrupulous lawyers use class actions to seek windfall payouts for their work with little redress for their clients. They are aided by a handful of renegade state court jurisdictions that have allowed class action cases to proceed to settlement or judgment without much precedent or, critics argue, merit.”).

⁴⁵ See, e.g., Remarks on Signing the Class Action Fairness Act of 2005, *supra* note 2, at 265-66 (praising the “valuable purpose” served by class actions before bashing them as an “extortion racket”); Editorial, *supra* note 3 (opening with the statement that “[c]lass actions are an important tool for protecting citizens’ rights” before explaining the need for CAFA to curb abuse).

livelihoods,⁴⁶ and could show that at least some CAFA proponents viewed the legislation as a class action death knell.⁴⁷

II. CAFA IN THE CONTEXT OF RECENT CLASS ACTION DEVELOPMENTS

CAFA joins a list of class action developments driven by concerns that class action lawyers abuse the system.⁴⁸ Like CAFA, these developments reflect a mistrust of class counsel coupled with an acceptance of the basic class certification standard. While they may have had some success at curbing abuses, these developments have also had un-

⁴⁶ Class action attorney Jerome Ringler argued, for instance:

The act's economic unfairness originates from a grave misperception: that plaintiffs' attorneys make too much money, thus compelling a congressional response. Are plaintiffs' attorneys, then, the first of many professionals to face this brand of congressional scrutiny? How much longer until Congress decides that doctors or actors or athletes—or defense attorneys—make too much money?

Jerome Ringler, *The Unfairness of the Class Action Fairness Act*, L.A. LAW., Mar. 2006, at 52, 52.

⁴⁷ See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) ("The admitted goal of congressional class action 'reform' is to save class actions by destroying them as viable state court proceedings and transferring them (at the whim of any single class member or defendant) to the federal system, where, the lobbyists in favor of 'reform,' at least, have promised the suits will languish and die.") (citing CitiGroup Global Markets, Industry Note, FLASH—Senate Just Passed Class Action Bill—Positive for Tobacco (Feb. 10, 2005)).

⁴⁸ CAFA arrives at a time of deep mistrust of mass litigators, which can be seen (as both cause and effect) in the proliferation of indictments, disciplinary actions, and civil lawsuits against mass plaintiffs' lawyers. The nation's leading securities class action firm, Milberg Weiss, was indicted along with several of its partners and former partners on charges that it made illegal payments to class representatives. See Peter Elkind, *The Law Firm of Hubris, Hypocrisy & Greed*, FORTUNE, Nov. 13, 2006, at 155; Koppel, *supra* note 10. The Milberg Weiss indictments are hardly the only proceedings against mass litigators in the last couple of years. Florida plaintiffs' lawyer Louis Robles was indicted in 2006 on federal mail fraud charges relating to the misappropriation of \$13.5 million in settlement funds belonging to his asbestos clients. Press Release, U.S. Dep't of Justice, Miami Attorney Indicted for Misappropriating at Least \$13.5 Million in Client Settlement Money (May 23, 2006), available at <http://miami.fbi.gov/dojpressrel/pressrel06/mm052306.htm>; see also Jordana Mishory, *Asbestos Clients of Lawyer Who Stole from Them Told They Can't Sue To Collect \$13.5 Million from Florida Bar*, BROWARD DAILY BUS. REV. (Fla.), Jan. 4, 2007, at 1. New York plaintiffs' firm Napoli Bern Ripka, which represented thousands of fen-phen plaintiffs, faces claims that it negotiated a mass settlement that provided the firm with more than its legitimate share of the funds. Anthony Lin, *Trial Ordered over Firm's Role in "Fen-Phen" Pact*, N.Y. L.J., Mar. 28, 2007, at 1. Three Kentucky mass tort attorneys were accused in 2006 of misappropriating more than half of a \$200 million settlement fund. See *Fen-Phen Lawyers Told To Disgorge \$20 Million*, NAT'L L.J., Mar. 20, 2006, at 18; *Three Fen-Phen Lawyers Indicted on Fraud Charges*, NAT'L L.J., June 18, 2007, at 3; *Three Ky. Fen-Phen Attorneys Are Suspended*, NAT'L L.J., Aug. 28, 2006, at 3.

intended consequences such as strengthening the upper tier of the class action bar.

Most significantly for our purposes, the Private Securities Litigation Reform Act (PSLRA), adopted in 1995, tightened the pleading standard for securities lawsuits and reformed the process for selecting class representatives and class counsel. Like CAFA, the PSLRA sought to make it more difficult for lawyers to abuse class actions for their own advantage. Senator Alfonse D'Amato spoke of "a feeding frenzy for plaintiffs' lawyers" in which lawyers take advantage of the unfairness of the system: "It is time to reform the securities class action litigation from a moneymaking enterprise for lawyers into a better means of recovery for investors."⁴⁹ He emphasized that the bill was aimed at untrustworthy lawyers: "[I]n this bill we go after the greatest abuse that is taking place, which is lawyers who do not represent the general public but represent themselves."⁵⁰

Many have noted that while the PSLRA may have been aimed at bringing down the leading class action lawyers, it had the opposite effect.⁵¹ Some describe the PSLRA as aimed directly at the Milberg Weiss firm:

⁴⁹ 141 CONG. REC. 35,238 (1995) (statement of Sen. D'Amato).

⁵⁰ *Id.* at 35,240. Similarly, speaking in favor of overriding President Clinton's veto of the PSLRA, then-Representative Charles Schumer described the need to end "frivolous securities suits":

Under the current system lawyers often bring lawsuits immediately after a drop in a company's stock price, without any further research into the real cause of the price decline. As a result the suits often have no substantive merit, but they have the effect of presenting the company with the unhappy choice between a costly, lengthy discovery process and an exorbitant, unjustified settlement. And what's worse, an inordinate share of the ultimate settlement often ends up in the pockets of the lawyers who brought the case, rather than in the bank accounts of the shareholders on whose behalf the lawyers ostensibly filed in the first place.

141 CONG. REC. E2437 (daily ed. Dec. 21, 1995) (statement of Rep. Schumer). Representative Schumer explained that his goal was not to eliminate class actions, but rather to correct certain abuses: "This bill goes a long way toward correcting these abuses without curtailing the essential rights of shareholders to sue corporations and insiders when there is legitimate evidence of fraud and deception." *Id.*

⁵¹ See, e.g., Timothy L. O'Brien, *Behind the Breakup of the Kings of Tort*, N.Y. TIMES, July 11, 2004, § 3, at 1 (calling the PSLRA "a measure aimed squarely at Milberg, Weiss," and reporting that "in the end, the act gave Milberg, Weiss—which could afford lengthy investigations—an advantage over smaller competitors and encouraged the firm to hunt bigger game"). But see Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1517 (2006) (showing that by one measure, market share concentration may have decreased post-PSLRA, and that although Milberg Weiss held a

Take, for instance, the Private Securities Litigation Reform Act, a 1995 law that many observers say was aimed at putting Milberg Weiss—and especially partner William Lerach, the lawyer many corporate executives love to hate—out of business. As one securities defense lawyer who lobbied for the PSLRA told *The New Yorker* last year, “The whole idea behind the law was to destroy Lerach.”⁵²

The effect, however, was not what proponents had intended. “[T]he PSLRA inadvertently benefited the larger plaintiffs’ firms, [securities lawyers] say. The result has been a much more concentrated securities plaintiffs’ bar dominated by big firms.”⁵³ A study of post-PSLRA securities class action settlements through 2003, for example, showed that “the law firm of Milberg Weiss Bershad Hynes & Lerach LLP was involved as lead or co-lead plaintiff counsel in over 50% of all post-Reform Act cases settled to date.”⁵⁴

Before the PSLRA, prosecuting a securities case was relatively cheap. Under PSLRA’s heightened pleading standard, however, “firms had to pony up enormous sums of money to draft a complaint that would withstand the inevitable motion to dismiss, with the very real possibility that they would never see a return on their investment.”⁵⁵ The PSLRA’s presumptive selection process for lead plaintiff and class counsel similarly raised the cost of doing business for plaintiffs’ securities class action lawyers. “Before the PSLRA was passed, almost any investor would do; the goal was simply to get to the courthouse first . . .”⁵⁶ The PSLRA replaced the race to the courthouse with a selection process focused on institutional investors. “As a result, plaintiffs firms have had to sink enormous amounts of cash into marketing their services to institutional clients, particularly pension funds, which are most likely to be appointed lead counsel in any given case.”⁵⁷

dominant market both before and after the PSLRA, the cumulative share of the next four firms dropped in the post-PSLRA period).

⁵² Tamara Loomis, *Milberg Weiss Stronger than Ever Despite Reform Act*, THE LEGAL INTELLIGENCER, Apr. 25, 2003, at 4.

⁵³ *Id.*

⁵⁴ LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, POST-REFORM ACT SECURITIES LAWSUITS: SETTLEMENTS REPORTED THROUGH DECEMBER 2003, at 14 (2004).

⁵⁵ Tamara Loomis, *In Spite of Reform Law, Milberg Weiss Emerges as Winner in Securities Suits*, N.Y. L.J., Apr. 22, 2003, at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*; see also *id.* (“Few firms have the financial resources to sink millions of dollars into developing a complaint, and even fewer are willing to take the risk of losing it all on a motion to dismiss. For the cases that survive, the chances that a firm not appointed

The PSLRA's sanctions provision also may have driven smaller firms out of the market. Former Milberg Weiss partner William Lerach, noting the study that showed an increase in his firm's appearance rate, wrote of the statute's opposite effect on smaller firms:

[A]s Congress was warned when it was considering the Reform Act, the mandatory sanction review provision of the Reform Act was so draconian that it inevitably would result in many competent but smaller firms or sole practitioners refusing to bring securities class action suits, no matter how meritorious they might believe the case to be. . . . We have seen smaller firms or sole practitioners either not file securities class actions cases, even though they were meritorious, or to seek out larger, more well-capitalized litigation partners to joint-venture cases with them.⁵⁸

Certain amendments to Federal Rule of Civil Procedure 23, like the PSLRA, grew out of concerns that class action lawyers may too easily abuse the system for their own benefit. After years of Advisory Committee proposals and public comment, the Supreme Court adopted amendments to Rule 23 in 1998 and 2003. Significantly, despite efforts at more fundamental class action reform,⁵⁹ neither set of post-1966 amendments touched Rule 23(a) or (b), which lay out the requirements for class certification. Instead, the amendments focused on procedural protections in class actions. The 1998 amendment created Rule 23(f), which provides for interlocutory appeals of class certification decisions at the discretion of the court of appeals.⁶⁰ In 2003, the Court adopted a broader package of Rule 23 amendments. Driven by recognition of the risk that class counsel may pursue and settle class actions on terms more favorable to counsel than to the class, the 2003 amendments tightened the process for approving class settlements⁶¹ and added new subsections addressing appointment of class counsel⁶² and awards of attorneys' fees.⁶³

lead counsel will make any real money are slim. As a result, the small practitioners for the most part have given up on securities work, [one plaintiffs'] lawyer said.").

⁵⁸ William S. Lerach, "The Private Securities Litigation Reform Act of 1995—27 Months Later": *Securities Class Action Litigation Under the Private Securities Litigation Reform Act's Brave New World*, 76 WASH. U. L.Q. 597, 612-13 (1998).

⁵⁹ See COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S. (JCUS), PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Aug. 1996); Comm. on Rules of Practice and Procedure, JCUS, Proposed Amendments to Rules of Civil Procedure (Feb. 1995 & Nov. 1995 Drafts), reprinted in Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 app. at 53-73 (1996).

⁶⁰ FED. R. CIV. P. 23(f).

⁶¹ FED. R. CIV. P. 23(e).

⁶² FED. R. CIV. P. 23(g).

⁶³ FED. R. CIV. P. 23(h).

The Supreme Court's most significant recent class action decisions came in a pair of asbestos settlement class actions. In *Amchem Products v. Windsor*,⁶⁴ the Court rejected a Rule 23(b)(3) settlement class action, and in *Ortiz v. Fibreboard Corp.*,⁶⁵ it rejected a Rule 23(b)(1)(B) limited-fund settlement class action. Both cases involved concerns that class action lawyers might agree to settle on terms disadvantageous to the class in order to earn substantial fees or to gain advantage in settlements of nonclass claims,⁶⁶ and sensitized federal judges to the "reverse auction"⁶⁷ risk in settlement class actions.⁶⁸

III. CAFA'S IMPACT ON CLASS ACTION LAWYERS

If the PSLRA and other class action developments have had the unintended consequence of strengthening a segment of the class action bar, will CAFA do the same? Early indications suggest that it may.

Understanding the statute's impact requires an appreciation of the resilience of mass litigators. Plaintiffs' lawyers have shown repeatedly that if certain avenues of mass litigation are foreclosed, they find other avenues.⁶⁹ Mass disputes do not disappear, so neither does mass

⁶⁴ 521 U.S. 591 (1997).

⁶⁵ 527 U.S. 815 (1999).

⁶⁶ See, e.g., *id.* at 855 (noting that the settling nonclass "inventory" clients of class counsel "appeared to have obtained better terms than the class members"); *Amchem*, 521 U.S. at 593 (expressing concern that a lawyer negotiating a settlement-only class action lacks settlement leverage).

⁶⁷ See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-73 (1995).

⁶⁸ See *Smith v. Sprint Commc'ns Co.*, 387 F.3d 612, 614-15 (7th Cir. 2004) (rejecting a settlement class action in part because class counsel, when negotiating the settlement, lacked the leverage of a certified litigation class action); T.R. Goldman, *Shattering Reform Myths*, LEGAL TIMES, Feb. 7, 2005, at 1 ("With cases forced into federal court, there will be fewer chances for companies to work the so-called reverse auction, which allows defendants to play one set of plaintiffs off another in order to achieve the lowest settlement price.").

⁶⁹ See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 530-43 [hereinafter Erichson, *Beyond the Class Action*] (describing nonclass mass litigation that functions like class actions); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386-417 (2000) (describing lawyer coordination in related lawsuits as a substitute for formal aggregation); Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 MISS. C. L. REV. 285, 287-96 (2005) [hereinafter Erichson, *Mississippi Class Actions*] (discussing the extent of mass aggregate litigation in Mississippi despite the absence of a class action rule). Francis McGovern expects unintended consequences from litigation reform in general and class action reform in particular:

litigation; it just reappears in different forms. Call this the Whac-a-Mole⁷⁰ effect. Knock the mole down in one spot, and it pops up in another.

CAFA's Whac-a-Mole effect manifests itself in several ways. The main point of CAFA was to permit defendants to remove large-scale class action litigation from plaintiff-favored state courts to federal courts. The data suggest that it is doing exactly that, as federal courts have experienced a significant upswing in class actions since CAFA's enactment. But class action plaintiffs' lawyers have not simply continued to file the same class actions they would have filed pre-CAFA, accepting the inevitability of removal to federal court. Rather, like the mole, they have popped up in different places. Early data suggest that class action lawyers have altered both the nature of their lawsuits and the forums in which they bring them. By looking at how CAFA has altered class action forum shopping and claim selection, we can better understand its likely impact on the class action bar.

A. CAFA's Impact on Forum Selection

To the extent a class action litigant prefers federal over state court, CAFA's impact is direct and obvious. Its impact on forum shopping, however, goes well beyond the vertical (federal-state) choice of forum. CAFA alters the horizontal (state-state or district-district) forum-selection game by shifting the action from state to federal court. Whereas pre-CAFA forum shopping by class action plaintiffs focused on identifiable jury pools and judges, often in small counties, post-CAFA forum shopping focuses on circuit law, and more often lands in big cities.

There is little question that CAFA has succeeded in shifting much class action litigation from state court to federal court since it went into effect on February 18, 2005. The Federal Judicial Center (FJC) released a preliminary study in April 2007 showing a significant in-

Although the authors of reform have the advantage of defining the rules of the game, there is the related disadvantage of being a stationary target. The range of options to circumvent stable rules is continuously subjected to the inventiveness of counsel. Given sufficient financial incentives or a narrowing range of alternative litigation opportunities, the marketplace of litigation has been fertile ground for unpredictable outcomes.

Francis E. McGovern, *Common Themes and Unintended Consequences in Class Action Reform*, 83 WASH. U. L.Q. 1107, 1112 (2005).

⁷⁰ Thanks to Charles Sullivan for the metaphor.

crease in federal court class actions, and concluding that “CAFA to date has had its intended effect of bringing more state-law diversity class actions into federal district courts.”⁷¹ Looking at federal court class actions filed or removed during six-month periods from mid-2001 through mid-2006, the study found a forty-six percent increase from the first period (July–December 2001) to the last (January–June 2006).⁷² The preliminary FJC data show a notable jump when CAFA took effect, growing by nineteen percent from the second half of 2004 to the first half of 2005:

Table 1: Federal Court Class Action Filings and Removals⁷³

July-Dec. 2003	Jan.-June 2004	July-Dec. 2004	Jan.-June 2005	July-Dec. 2005	Jan.-June 2006
1573	1642	1655	1971	1891	1998

On a month-to-month breakdown, the highest number of class actions filed in or removed to federal court occurred in March 2005, the first full month after CAFA took effect.⁷⁴ Focusing on diversity jurisdiction class actions because they are the ones for which CAFA broadened federal jurisdiction, the FJC researchers point out that the average number of diversity class actions per month increased from twenty-eight cases per month pre-CAFA to fifty-six cases per month post-CAFA.⁷⁵

Corresponding data from state courts is needed to confirm that the FJC findings reflect a shift from state to federal court, rather than simply a growth in class actions.⁷⁶ A study of California class actions,

⁷¹ THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21 (2007) [hereinafter FJC THIRD INTERIM REPORT].

⁷² *Id.* at 2.

⁷³ Data from Summary Table 1, E-mail from Thomas Willging to Howard Erichson (Aug. 1, 2007) (on file with author).

⁷⁴ Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1750 (2008).

⁷⁵ *Id.* at 1751; see also FJC THIRD INTERIM REPORT, *supra* note 71, at 14 (reporting an increase from 27.0 cases per month pre-CAFA to 53.4 cases per month post-CAFA).

⁷⁶ See Lee & Willging, *supra* note 74, at 1748 (noting that accurate information on state court class action activity is needed to confirm a CAFA effect, but that “information on class action activity in the state courts of this kind is not available at this time”).

currently underway by California's Office of Court Research, should help provide a clearer picture of CAFA's effect.⁷⁷ The FJC's November 2007 progress report combines FJC federal court data with preliminary data from the California research covering seven superior courts including Los Angeles County. The data show a decrease in California state court class actions from 2004 to 2005, alongside an even greater increase in class actions in the California federal courts.⁷⁸ Although both the federal and state studies are ongoing and subject to revision, these preliminary results strongly suggest that CAFA has shifted class action activity from state courts to federal courts even as the total number of class actions in California⁷⁹ has grown.

Another hint of CAFA's state court impact may be seen in the state court most often cited by CAFA's proponents as a symbol of class actions run amok—Madison County, Illinois. During the late 1990s and early 2000s, the Madison County courts received class action filings far out of proportion to the county's small population, and CAFA proponents regularly referred to the county in their arguments for federal jurisdiction.⁸⁰ Class action filings in Madison County totaled 106 in 2003 and 84 in 2004, but dropped sharply when CAFA took ef-

⁷⁷ The study is being conducted by the Office of Court Research of California's Administrative Office of Courts, in conjunction with Professor Richard Marcus of Hastings College of the Law. The most recent FJC progress report on CAFA mentions the FJC's collaboration with the California researchers and presents preliminary data on the relationship between state and federal class actions in California. FED. JUDICIAL CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 3-5 (2007) [hereinafter FJC PROGRESS REPORT].

⁷⁸ *Id.* at 4-5 & fig.1.

The [Office of Court Research] found a decrease in California class action activity between 2004 and 2005 in those seven superior courts; however, the number of class action[s] found in 2005 still represented an increase over 2002 and 2003. By comparison, the FJC found a marked increase in class action activity in 2005 in the four California federal district courts—especially in the Central District of California, which includes Los Angeles County.

Id. at 4; see also Lee & Willging, *supra* note 74, at 1748 n.84 (reporting the same data).

⁷⁹ The growth of total class action filings in California does not necessarily indicate a nationwide growth in the total number of class actions. Because Ninth Circuit law is relatively favorable to class certification, forum selection by class action plaintiffs' attorneys may give the California federal district courts a disproportionate share of post-CAFA federal court class actions. On post-CAFA forum selection, see *infra* text accompanying notes 92-105.

⁸⁰ Indeed, when President Bush signed CAFA, he described his recent visit to Madison County and introduced a class member who received a coupon settlement from a Madison County class action. Remarks on Signing the Class Action Fairness Act of 2005, *supra* note 2.

fect, with 36 class actions filed from January 1 through February 17, 2005, but only 10 filed during the remainder of 2005⁸¹ and only 3 in 2006.⁸² Madison County's judiciary underwent reforms during the same period,⁸³ so the decline in class actions may not be due entirely to CAFA, but the sudden drop in filings at CAFA's effective date strongly suggests that the statute had its intended effect in a forum at which it was unabashedly directed.

CAFA has increased not only the number of class action removals to federal court, but also the number of class action original filings in federal court.⁸⁴ Indeed, the increase in original filings exceeds the increase in removals.⁸⁵ During the years leading up to CAFA, most diversity class actions in federal court got there by removal, but since

⁸¹ Ann Knief, *Class Action Fairness Act: Is It Working?*, MADISON-ST. CLAIR REC. (Ill.), Mar. 27, 2006, at 1; Shruti Date Singh, *Madison County Goes Quiet: Class Actions Halt After Federal Law, Ill. Courts Curb Forum Shopping*, CRAIN'S CHI. BUS., Sept. 11, 2006, at 1.

⁸² Ann Knief, *ATRA's Excerpts: Callis Credited for Madison County's Improvements*, MADISON-ST. CLAIR REC. (Ill.), Dec. 24, 2007, at 2 (citing AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 2007, available at <http://www.atra.org/reports/hellholes/report.pdf> [hereinafter ATRA 2007 REPORT]). The 2007 report's numbers differ slightly from those cited in earlier articles; it states that Madison County had 106 class actions in 2003, 87 in 2004, and 56 in 2005. ATRA 2007 REPORT, *supra*, at 20.

⁸³ See Steve Gonzalez, *Madison, St. Clair Drop Down in "Hellhole" Ranking*, MADISON-ST. CLAIR REC. (Ill.), Dec. 18, 2006, at 1 (describing new rules implemented in Madison County); ATRA 2007 REPORT, *supra* note 82, at 19-20 (crediting largely the reform efforts of Chief Judge Ann Callis).

⁸⁴ Although Kevin Clermont and Theodore Eisenberg's findings on CAFA judicial activity may appear to contradict this, there is no inconsistency. Clermont and Eisenberg studied all reported cases on CAFA during its first two and a half years. They found that ninety-one percent of the district court CAFA cases had been removed from state court rather than filed originally in federal court. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1562 (2008). Because the study looks only at reported opinions that mention CAFA, however, it reflects a specific subset of the universe of federal court class actions, and is particularly unlikely to reflect the overall rate of removals and original filings, as Clermont and Eisenberg acknowledge:

Probably the difference shows merely that among CAFA class actions, removed cases are the ones generating pitched battles and hence published opinions, and especially opinions that expressly mention the Class Action Fairness Act or CAFA. The difference between the two studies thus may reflect the danger of relying only on published cases to get a picture of what is really happening on the ground.

Id. at 1563.

⁸⁵ FJC THIRD INTERIM REPORT, *supra* note 71, at 16-17.

CAFA's enactment, most diversity class actions in federal court were filed there originally.⁸⁶

"As removal becomes more predictable," the FJC report explains, "plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated with removal."⁸⁷ Others have made similar observations, such as one defense lawyer who described post-CAFA class action practice: "We have seen in our practice more plaintiffs' lawyers filing in federal court. They're recognizing reality—they don't want to be frustrated by the delay of filing in state court, then getting removed to federal court."⁸⁸

The delay involved in the removal process, however, is not the only reason plaintiffs' attorneys choose to file originally in federal court. They file in federal court in order to choose the forum.⁸⁹ Upon removal, federal court venue lies in the district in which the state court is located.⁹⁰ If the plaintiff files the action originally in federal district court, by contrast, the plaintiff can choose any district court with proper venue and with personal jurisdiction over the defendants. In nationwide class actions, plaintiffs often can choose from a number of federal districts.

When plaintiffs choose to file originally in federal court, the rules of the forum-selection game change. State court forum selection often focuses on courts with relatively clear characteristics in the jury pool and a relatively small pool of judges. Oft-cited examples include Madison and St. Clair Counties in southern Illinois, Jefferson County in Mississippi, and Hidalgo and Jefferson Counties in Texas.⁹¹

⁸⁶ Lee & Willging, *supra* note 74, at 1752 (reporting that pre-CAFA diversity removals and original filings averaged 16.6 and 10.8 per month respectively, and post-CAFA diversity removals and original filings averaged 23.7 and 31.5 per month respectively).

⁸⁷ FJC THIRD INTERIM REPORT, *supra* note 71, at 16.

⁸⁸ Bob Yates, *Class Action Fairness Act; More than a Year Later*, CHI. LAW., Dec. 2006, at 54, 55 (quoting Michael Pope).

⁸⁹ See FJC THIRD INTERIM REPORT, *supra* note 71, at 17 (noting that by filing class actions in federal court as original proceedings, "plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum").

⁹⁰ See 28 U.S.C. § 1441(a) (2000) (permitting removal "to the district court of the United States for the district and division embracing the place where such action is pending").

⁹¹ The best-known list of plaintiff-friendly jurisdictions is the American Tort Reform Association's (ATRA) controversial annual list of "Judicial Hellholes." ATRA's final pre-CAFA report featured the following top five "hellholes": Madison County, Illinois; St. Clair County, Illinois; Hampton County, South Carolina; the State of West Virginia; and Jefferson County (Beaumont), Texas. See ATRA 2004 REPORT, *supra* note

Federal court forum selection generally does not allow such specific jury-pool shopping, as federal courts pull potential jurors from broader areas that include multiple communities. Rather, federal court forum selection tends to focus on the law applied by the courts of appeals, and sometimes on specific judges hearing related cases.⁹²

The law on class certification varies from one circuit to another.⁹³ John Coffee and Stefan Paulovic, surveying recent developments, point to the Second, Third, and Ninth Circuits as relatively liberal on class certification, and the Fourth, Fifth, and Seventh Circuits as relatively conservative.⁹⁴ The Eleventh Circuit appears receptive to class actions as well.⁹⁵ Given the centrality of the class certification decision, class action attorneys must take these differences into account when choosing a federal forum.⁹⁶

20, at 14-25. The previous year, ATRA's top five were Madison County, Illinois; Jefferson County, Texas; the 22nd Judicial Circuit (Copiah, Claiborne, and Jefferson Counties), Mississippi; Hidalgo County, Texas; and Orleans Parish, Louisiana. See AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2003, at 3-8 (2003) [hereinafter ATRA 2003 REPORT], available at <http://www.atra.org/reports/hellholes/2003/report.pdf>. Madison County topped ATRA's list in 2002, 2003, and 2004, before dropping to fourth in 2005, sixth in 2006, and finally dropping off the list in 2007. See ATRA 2007 REPORT, *supra* note 82, at 19-20. The U.S. Chamber of Commerce similarly identifies court systems that its members consider unfriendly to businesses; in 2004, its top four business-unfriendly state court systems were Mississippi, West Virginia, Alabama, and Louisiana. See Martin Kasindorf, *Robin Hood Is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 8, 2004, at 1A. For a counterperspective, see CONGRESS WATCH, PUB. CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING (2005), available at <http://www.citizen.org/documents/OutlierReport.pdf>.

⁹² For an analysis of various factors that affect class action forum selection, see Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591 (2006).

⁹³ One report quotes defense lawyer Stanley Parzen on federal forum shopping:

"In a securities context for instance, in the 4th and 5th Circuits if you have individual representations and the plaintiff has to show reliance, that individual issue is very likely going to doom a class action in those circuits without any doubt whatsoever," he says. "In the 2nd Circuit, it's not quite as clear. You might be able to do it anyway."

Jarrett Banks, *Plaintiffs Find Loopholes in Class Action Fairness Act*, CORP. LEGAL TIMES, June 2005, available at <http://www.insidecounsel.com/section/litigation/135>.

⁹⁴ Coffee & Paulovic, *supra* note 16, at S-819; see also Yates, *supra* note 88, at 56 ("But even in the federal court system," Michael Pope said, "different circuits are more class action-friendly than others. The Seventh Circuit applies a pretty careful standard. They're less inclined to certify than other circuits.").

⁹⁵ See e.g., *Klay v. Humana, Inc.*, 382 F.3d 1241, 1246 (11th Cir. 2004) (certifying a class action against HMOs).

⁹⁶ Looking at pre-CAFA class action data, John Coffee and Stefan Paulovic observed that CAFA might alter forum selections:

The FJC data show that, while every circuit experienced some post-CAFA increase in diversity class action filings, the growth varied dramatically.⁹⁷ The district courts within the Ninth Circuit saw by far the biggest post-CAFA increase, growing nearly sixfold from 2004.⁹⁸ Given lawyers' perception of the Ninth Circuit as relatively liberal on class certification, the disproportionate growth of filings in its districts should come as no surprise. Nor is it surprising to see large jumps in diversity class action filings within the Third Circuit, where they nearly quadrupled, and within the Second and Eleventh Circuits, where they more than doubled.⁹⁹ The growth was much smaller in the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.¹⁰⁰

More telling, the relatively class-friendly circuits saw disproportionate increases in original proceedings, as compared with other circuits that on the whole saw greater increases in removals. In the D.C., Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits, the post-CAFA increase in original filings outpaced the increase in removals, while in the First, Seventh, Eighth, and Tenth Circuits, the increase in removals was larger than the increase in original filings.¹⁰¹ In other

Overall, the inter-Circuit pattern seems highly stable—but again CAFA could disrupt this stability. Recognizing that their class actions could be removed from state courts under CAFA, plaintiff's attorneys may instead file class actions initially in "friendly" jurisdictions, such as the Second and Ninth, rather than see them removed to "unfriendly" federal courts in the Fourth and Fifth Circuits.

Coffee & Paulovic, *supra* note 16, at S-789–80.

⁹⁷ Figure 5 in the FJC report shows the disparate effect of CAFA in the various federal courts of appeals, with by far the biggest increase in the Ninth Circuit. FJC THIRD INTERIM REPORT, *supra* note 71, at 18 fig.5.

⁹⁸ See *id.* at 18 (reporting that the number of diversity class actions in the district courts of the Ninth Circuit "increased almost six-fold after CAFA, accounting for 30% of the [nationwide] increase").

⁹⁹ *Id.* at 18 fig.5; see also Lee & Willging, *supra* note 74, at 1759–60. It is more difficult to explain the significant growth of class actions within the Fifth Circuit, as Fifth Circuit case law is not particularly helpful to class action plaintiffs. The Fifth Circuit data might be attributable to Hurricane Katrina insurance litigation. See *infra* note 101.

¹⁰⁰ FJC THIRD INTERIM REPORT, *supra* note 71, at 18 fig.5.

¹⁰¹ Lee & Willging, *supra* note 74, at 1760 fig.7. Lee and Willging point out that the FJC data do not perfectly match expectations of forum shopping based on circuit-by-circuit differences in class certification. Most notably, the Fifth Circuit experienced not only a significant post-CAFA increase in class actions, but more surprisingly a greater increase in original class action filings than in removals. *Id.* at 1761. Lee and Willging suggest, as one possible explanation, that during the relevant time period the courts within the Fifth Circuit saw many cases relating to Hurricane Katrina insurance coverage. *Id.* at 1761–62.

words, it appears that while CAFA has enabled defendants to remove class actions to federal courts where defendants see a strategic advantage in removal, CAFA also has encouraged plaintiffs' lawyers to file class actions in those federal courts perceived to be most amenable to class certification.

Differences are even more dramatic at the district court level. According to the FJC data, seventy percent of the federal districts saw post-CAFA increases in diversity class actions, sixteen percent decreased, and fourteen percent had no change.¹⁰² Notable increases occurred in the Central District of California, the District of New Jersey, the Northern District of California, the Eastern District of Pennsylvania, and the Eastern District of New York.¹⁰³ This forum selection is consistent with the perception of the Ninth, Third, and Second Circuits as providing relatively favorable law on class actions,¹⁰⁴ and may also reflect perceptions of particular federal district judges.¹⁰⁵

In sum, CAFA appears to have altered the forum-selection calculus for class action lawyers. Anticipating the likelihood of removal, plaintiffs' attorneys cannot simply seek favorable state court forums, many of which were in smaller rural counties or blue-collar suburbs. Rather, they choose to file originally in federal court, seeking the most favorable federal forums, including Los Angeles, San Francisco, New Jersey, Philadelphia, and New York.

¹⁰² FJC THIRD INTERIM REPORT, *supra* note 71, at 19.

¹⁰³ *Id.* at 19-20 & fig.6.

¹⁰⁴ The FJC report points out that of the ten districts with the most diversity class actions, nine saw at least a doubling of their diversity class action filings after CAFA; the one exception was the Northern District of Illinois, which increased only by one case during the relevant period. *Id.* at 20. The Northern District of Illinois falls within the class-unfriendly Seventh Circuit, whereas the biggest growth districts were in the Ninth, Third, and Second Circuits.

¹⁰⁵ Ted Frank of the American Enterprise Institute, who favored CAFA and disfavors most class actions, makes the following point about both districts and circuits: "Federal courts do not create quite the same opportunities for forum-shopping that the magnet jurisdictions of old did, but some opportunities are there." Ted Frank, *The Class Action Fairness Act Two Years Later*, LIABILITY OUTLOOK, Mar. 2007, at 2, available at http://www.aei.org/docLib/20070327_Liability.pdf. He points to the Eastern District of New York as an example, stating, "Judge Weinstein's courtroom shows that there are still some magnet jurisdictions out there, and that those magnets will grow even stronger if the Second Circuit does not take a stand on defending federal class-certification standards." *Id.* He points, as well, to "the beginning of a magnet jurisdiction in the Ninth Circuit." *Id.* at 3.

B. CAFA's Impact on Claim Selection

Not only has CAFA altered the way class action lawyers think about forum selection, it also appears to have altered the selection of class action claims that lawyers choose to pursue. Growth in federal court class actions after CAFA has not occurred evenly across types of suits. To the extent certain types of class actions are perceived as less viable in federal court than in the state courts where they would have been brought before CAFA, adaptive claim selection offers a plausible explanation for the differences.

The increase in federal court class actions has varied significantly by type of case. Certain categories of class actions—contract, fraud, property damage, labor—increased after CAFA, while personal injury class actions decreased and civil rights class actions held steady.¹⁰⁶ Personal injury class certification motions have been famously unsuccessful in federal courts,¹⁰⁷ even as they continued to have scattered success in state courts.¹⁰⁸ The FJC data show no change or a slight

¹⁰⁶ FJC THIRD INTERIM REPORT, *supra* note 71, at 3-15. Figure 1 from the FJC report vividly illustrates the increase in labor, contract, and certain other types of class actions in early 2005—CAFA took effect on February 18, 2005—while other types of class action filings declined or held steady. *Id.* at 4 fig.1. Reporting a “marked increase in the number of diversity class actions in federal court,” the report notes that “[t]hese additional cases so far have primarily been contract and common-law fraud cases, plus a small number of property damage class actions.” *Id.* at 21.

¹⁰⁷ *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Blain v. SmithKline Beecham Corp.*, 240 F.R.D. 179 (E.D. Pa. 2007); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006); *Sanders v. Johnson & Johnson, Inc.*, No. 03-2663, 2006 WL 1541033 (D.N.J. June 2, 2006); *Sweet v. Pfizer*, 232 F.R.D. 360 (C.D. Cal. 2005); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555 (E.D. Ark. 2005); *Harris v. Purdue Pharma, L.P.*, 218 F.R.D. 590 (S.D. Ohio 2003); *In re Baycol Prods. Litig.*, 218 F.R.D. 197 (D. Minn. 2003); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157 (S.D.N.Y. 2003); *In re Paxil Litig.*, 212 F.R.D. 539 (C.D. Cal. 2003); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61 (S.D.N.Y. 2002); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625 (W.D. Wash. 2002); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133 (E.D. La. 2002).

¹⁰⁸ *See* Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93, 96-97 (2001); *see also, e.g., Settlement Agreement, Hoorman v. SmithKline Beecham Corp.*, No. 04-L-715 (Ill. Cir. Ct. Oct. 6, 2006), available at <http://www.paxilpediatricsettlement.com/pdfs/SettlementAgreement.pdf> (approving settlement class action in Paxil litigation).

decrease in personal injury tort class actions¹⁰⁹ but an increase in class actions claiming property damage,¹¹⁰ breach of contract,¹¹¹ and fraud.¹¹² To a class action lawyer deciding which mass litigation opportunities justify a substantial investment of time and money, personal injury class actions may have appeared worth pursuing in state court before CAFA, but post-CAFA, if the cases would be removed to a federal court where class certification is unlikely, the lawyer may choose instead to pursue a different legal theory, demand a different type of relief, or pursue different sorts of cases.

Many variables affect the frequency of each type of class action, which makes it difficult to draw firm conclusions about CAFA from the differential growth rates among nature-of-suit categories. The temporary decline in securities class actions,¹¹³ for example, during a

¹⁰⁹ See FJC THIRD INTERIM REPORT, *supra* note 71, at 7 (reporting that federal court personal injury class actions “reached their lowest level in the study period in January–June 2006—forty-one cases, down from sixty-six cases in January–June 2005,” and down from a high of sixty-eight in January–June 2003); Lee & Willging, *supra* note 74, at 1756 (reporting that personal injury tort class actions in federal court averaged 7.1 per month both before and after CAFA’s enactment). Lee and Willging call the personal injury data “somewhat unexpected” and suggest that the absence of any increase in personal injury tort class actions in federal court “may signal some frustration of congressional intent.” *Id.*

¹¹⁰ See FJC THIRD INTERIM REPORT, *supra* note 71, at 7-8 (reporting an increase in diversity jurisdiction property damage class actions from a monthly average of 1.7 pre-CAFA to 4.2 post-CAFA).

¹¹¹ See *id.* at 5-6 (reporting an increase in contract class actions based on diversity of citizenship); see also Clermont & Eisenberg, *supra* note 84, at 1562 (reporting that most of the published judicial decisions on CAFA have involved contract and insurance cases); Lee & Willging, *supra* note 74, at 1755 (“[M]uch of the increase in diversity filings and removals has been driven by a large increase in the number of state-law Contracts actions filed in or removed to the federal courts.”).

¹¹² See FJC PROGRESS REPORT, *supra* note 77, at 7 (reporting that diversity jurisdiction “other fraud” class actions numbered twenty-four in 2002, twenty-six in 2003, thirty in 2004, and eighty-eight in 2005 (of which eighty-two were filed or removed after CAFA took effect)); see also FJC THIRD INTERIM REPORT, *supra* note 71, at 10 (noting that diversity jurisdiction “other fraud” class actions increased from a monthly average of 2.3 pre-CAFA to 8.4 post-CAFA, while the average number of federal question “other fraud” class actions remained stable).

¹¹³ See FJC THIRD INTERIM REPORT, *supra* note 71, at 12 & fig.2e (showing a decline from 241 securities class actions in July–December 2001 to 110 in January–June 2006). The pace of securities class actions picked up again in 2007, according to a study by the Stanford Law School Securities Class Action Clearinghouse and Cornerstone Research. See CORNERSTONE RESEARCH, 2007: A YEAR IN REVIEW 2 (2008), available at http://securities.stanford.edu/clearinghouse_research/2007_YIR/20080103-01.pdf (finding a forty-three percent increase in securities fraud class actions from 2006 to 2007).

period when stock prices were stable or rising,¹¹⁴ when several federal appellate courts imposed more rigorous review of securities class certification,¹¹⁵ and when the nation's leading securities class action firm was under pressure from the federal prosecutors,¹¹⁶ probably says nothing about CAFA. Nonetheless, the overall picture painted by the data, with distinct increases in certain types of class actions when CAFA took effect, suggests that lawyers analyze class action claim selection differently in federal court than in state court.

One intriguing question is what to make of the increase in federal question class actions. Certain types of federal law class actions, notably Fair Labor Standards Act (FLSA) cases and federal consumer protection cases, increased in number after CAFA took effect. Labor is the single largest category of class actions identified in the FJC study, and the data show a marked post-CAFA increase in labor class actions, particularly FLSA actions.¹¹⁷ Federal consumer protection class actions—claims under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and the Truth in Lending Act—also rose in the wake of CAFA.¹¹⁸

At first glance, one would not expect CAFA to affect federal question class action filings, which could have been brought in federal court even before CAFA.¹¹⁹ Indeed, the FJC reports initially rejected any connection between CAFA and the increase in labor class actions, reasoning that CAFA's jurisdictional provisions affected only diversity jurisdiction: "There is no reason to think that CAFA affected labor cases, as none of the 6,056 labor class actions identified in the study were based

¹¹⁴ See, e.g., Dow Jones Indexes 2000–2009 Decade Chart, http://djindexes.com/mdsidx/downloads/2000_2009.pdf.

¹¹⁵ See Coffee & Paulovic, *supra* note 16 at S-787 (noting "more rigorous certification criteria for securities class actions, which once were simple," as a major factor in the decline of securities class actions in 2005 and 2006) (citing *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005)).

¹¹⁶ See Elkind, *supra* note 48 (describing the downfall of Milberg Weiss).

¹¹⁷ FJC THIRD INTERIM REPORT, *supra* note 71, at 11. The increase is due to FLSA, as the other category of labor class actions—ERISA actions—remained steady. *Id.*

¹¹⁸ The FJC's earlier research coded these cases in the catch-all "Other Statutory Actions" category, but its November 2007 progress report shows the results of reclassifying the federal consumer cases. FJC PROGRESS REPORT, *supra* note 77, at 5-6. The Third Interim Report's Figure 1, *supra* note 71, at 4 fig.1, shows the growth in Other Statutory Actions in 2005; the new information in the November 2007 progress report helps to explain that growth.

¹¹⁹ See 28 U.S.C. § 1331 (2000) (granting original federal jurisdiction over claims arising under federal law).

on diversity of citizenship.”¹²⁰ While CAFA’s direct impact was limited to diversity class actions, however, its indirect impact probably accounts for some of the increase in federal question class actions.

CAFA may have increased federal question class actions in at least three ways. First, it eliminates the forum-selection disincentive to asserting federal claims. Before CAFA, plaintiffs committed to preserving a state court forum would have omitted federal law claims, relying instead solely on state law theories, to avoid removal based on federal question jurisdiction. To the extent CAFA renders an action removable without regard to federal question jurisdiction, it frees the plaintiff to assert federal legal theories instead of or in addition to state law claims.¹²¹

Second, by offering a basis for federal jurisdiction over not-quite-pendent state claims, CAFA enables lawyers to bring federal and state claims together in a way that was previously blocked in federal court. When a federal claim is joined with a state claim, CAFA allows the claims to be pursued together in federal court as long as the class action meets CAFA’s jurisdictional requirements, regardless of whether the court would exercise supplemental jurisdiction.¹²² Employees often pursue state law wage-and-hour claims along with federal FLSA claims,¹²³ and federal courts may decline supplemental jurisdiction

¹²⁰ FJC THIRD INTERIM REPORT, *supra* note 71, at 11. Because the increase in labor class actions constituted such a significant portion of the cases, the report repeatedly stressed the distinction between diversity cases, which could be attributed to CAFA, and federal question cases, which could not. *See id.* at 2 (“Much of that increase was in federal question cases, especially labor class actions, and thus not attributable to the effects of CAFA.”); *id.* at 4 (“[A] great deal of that increase in class action activity was in labor cases, and thus was not attributable to CAFA.”). More recently, however, the FJC report’s authors have acknowledged that CAFA might have affected federal question filings. *See Lee & Willging, supra* note 74, at 1749 (“It is possible, however, that CAFA may increase the number of federal question original proceedings indirectly, at the margins.”).

¹²¹ *See Lee & Willging, supra* note 74, at 1749.

¹²² *See* 28 U.S.C. § 1367(a) (2000) (limiting supplemental jurisdiction to claims that form part of the same controversy); *id.* § 1367(c) (permitting federal courts to decline to exercise supplemental jurisdiction over state law claims).

¹²³ *See, e.g., In re Farmers Ins. Exch. Claims Representatives’ Overtime Pay Litig.*, No. MDL 1439, 2003 WL 23669376, at *1 (D. Or. May 19, 2003) (outlining plaintiffs’ complaint under FLSA and state law asserting that employer unlawfully refused to grant overtime pay); *Trotter v. Perdue Farms, Inc.*, No. 99-0893, 2001 WL 1002448, at *1 (D. Del. Aug. 16, 2001) (describing plaintiffs’ claims under FLSA, ERISA, and state law, asserting that employer failed to compensate employees for time spent complying with OSHA requirements); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 83-84 (S.D.N.Y. 2001) (detailing plaintiffs’ claims under FLSA and state law asserting that employer paid them less than minimum wage).

over such state law claims.¹²⁴ CAFA, by conferring federal jurisdiction over the class action state law claims, facilitates federal court adjudication of wage-and-hour cases in their entirety.

Third, by altering the class action environment, CAFA may have forced some class action lawyers to adapt by shifting their practice into areas that have a greater likelihood of success in federal court. Given the nature of mass litigation practice, in which litigation opportunities must be evaluated prior to the investment of substantial resources and attorney time, it is plausible that CAFA could have caused some class action lawyers to shift some of their practice into federal question cases, with the idea that if large class actions will be in federal court, they may as well pursue the claims with the greatest likelihood of federal class certification and success on the merits. To the extent CAFA reduced the appeal of investment opportunities in certain state law class actions, it could have led attorneys to pursue more appealing options in federal court.

On the other hand, the growth in FLSA and federal consumer class actions may have had nothing to do with CAFA, and may simply reflect an increase in the number of such cases. Before CAFA took effect, FLSA class actions were already on the rise;¹²⁵ the sharper post-CAFA increase and then flattening may have been the culmination of a developing practice area rather than a CAFA effect. Moreover, many FLSA class actions are filed by employment litigation specialists—indeed, a significant percentage of them are filed by a single Florida firm.¹²⁶ A prevalence of specialists diminishes the likelihood

¹²⁴ See *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311-12 (3d Cir. 2003) (reversing decision to grant supplemental jurisdiction where state law wage-and-hour claim was raised late and presented complex issues unnecessary for the FLSA claim). State law wage-and-hour claims ordinarily are pursued as opt-out class actions, whereas the FLSA establishes an opt-in procedure. 29 U.S.C. § 216(b) (2000).

¹²⁵ Whether because of changes in employment practices, new federal regulations, or other reasons, FLSA class actions nearly tripled from 2001 to 2004. See Amy I. Stickel, *FLSA Suits Take Flight*, COUNSEL TO COUNSEL, Mar. 2005, at 16, 17 (reporting, based on data compiled by LexisNexis CourtLink, that the number of FLSA class actions filed in federal district courts rose from 397 in 2001 to 1076 in 2004); see also Samuel D. Walker & Jennifer E. Chung, *Trends in Workplace Litigation: The Rising Popularity of FLSA Class Actions* 2-3 (Aug. 9, 1999) (unpublished conference paper), available at <http://www.bna.com/bnabooks/ababna/annual/99/annual29.pdf> (arguing that large-scale FLSA suits in the year prior to the article's publication demonstrated that such claims would continue to gain popularity).

¹²⁶ See Stickel, *supra* note 125, at 17 ("Several Florida lawyers and firms account for the lion's share of [FLSA] suits, as some of those attorneys have apparently started their own cottage industry in this area of the law."). Nearly half of the FLSA class actions filed in 2004 were filed in the Southern District of Florida. *Id.* One firm, the

that CAFA-induced claim selection explains the growth. Federal consumer protection class actions, too, had been rising for several years before CAFA, although they rose faster when CAFA took effect.¹²⁷ Without further quantitative or qualitative research, it is impossible to say exactly what caused the increase in certain types of federal question class actions.¹²⁸ Nonetheless, the post-CAFA increase in certain types of federal question cases is hard to ignore. As the most recent FJC progress report states, "[t]hat the largest percentage increase in

Shavitz Law Group, represented the named plaintiff in 227 FLSA class actions in 2004, accounting for over forty percent of the FLSA class actions in the district and twenty-one percent of the FLSA class actions filed in the United States. *Id.* at 17-18. The Shavitz firm devotes its practice to wage-and-hour claims. *See* Shavitz Law Group, About Us, http://www.shavitzlaw.com/about_us.html (last visited Apr. 15, 2008) ("Founded in December, 1999, the Shavitz Law Group is . . . dedicated to representing employees, both current and former, who have disputes regarding unpaid wages. The claims litigated by the Shavitz Law Group pertain to violations of the Fair Labor Standards Act which is the law that regulates the payment of overtime wages for hours worked in excess of forty within a work week."); *see also* Jessica M. Walker, *Are FLSA Suits Too-Lucrative Labors for Plaintiffs Attorneys?*, DAILY BUS. REV. (Fla.), Dec. 16, 2005, available at <http://www.law.com/jsp/PubArticle.jsp?id=1134641114326> (discussing a legal battle between Shavitz and defense counsel over legal fees).

The prominence of the Shavitz firm and the Southern District of Florida in FLSA class action litigation explains an otherwise surprising difference between the FJC's Second Interim Report and Third Interim Report on CAFA. In contrast to the Third Interim Report, in the Second Interim Report the FJC did not observe a significant growth in labor class actions: "Labor cases, which consist primarily of federal Fair Labor Standards Act (FLSA) and Employment Retirement Income Security Act (ERISA) cases, increased somewhat after CAFA went into effect but not to a statistically significant degree." THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005: SECOND INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8 (2006) [hereinafter FJC SECOND INTERIM REPORT]. The Second Interim Report included data from the eighty-five district courts that used the Case Management/Electronic Case Filing ("CM/ECF") system and had created electronic docketing records for cases filed as of July 1, 2001. *Id.* at 1. The Southern District of Florida subsequently installed the CM/ECF system, enabling the FJC to include it in the study. *See* FJC THIRD INTERIM REPORT, *supra* note 71, at 1 ("This report includes data for the entire five-year study period from three district courts not included in the previous report (the Southern District of California, the Southern District of Florida, and the District of New Mexico); the CM/ECF system was recently installed in these districts, making their inclusion in the study possible.").

¹²⁷ Federal consumer class actions in federal court increased by ten percent in 2003, by eleven percent in 2004, and by seventeen percent in 2005. FJC PROGRESS REPORT, *supra* note 77, at 6.

¹²⁸ The FJC expects that the next phase of its class actions study will shed some light on this. *See id.* at 7 ("[W]hen Phase II of the study is completed, we will be able to determine whether some of this increase was caused by more consumer cases being brought as federal question cases because of CAFA.").

the number of [federal consumer protection class actions] occurred in the same year as CAFA became law suggests a CAFA effect.”¹²⁹

While the effect is difficult to pinpoint, it appears that CAFA has altered the mix of claims pursued by class action lawyers. With the likelihood of litigating in federal court, class action lawyers appear less inclined to pursue personal injury tort claims and increasingly interested in contract, fraud, wage-and-hour, and consumer protection claims.

C. CAFA's Impact on the Class Action Bar

Given the adjustments the statute has brought in class action forum and claim selection, CAFA appears likely to strengthen the more powerful class action firms while marginalizing others.¹³⁰ Five CAFA-induced shifts in class action practice portend such consolidation of power within the class action bar: the shift from state court to federal court, from rural counties to urban centers, from personal injury to economic injury, from state claims to federal claims, and from multiple lead class counsel to single lead counsel or committee.

A shift from state court to federal court—the most significant and direct impact of CAFA—favors firms with greater federal court experience.¹³¹ It disfavors law firms with a higher comfort level in state court,¹³² and particularly firms with practices dependent upon strong connections to particular state courts.

¹²⁹ *Id.* at 6-7. *But see* Lee & Willging, *supra* note 74, at 1758 (“Both Labor and Consumer Protection/Fraud class actions reached their highest observed level in 2005, the year in which CAFA became law. But that, in itself, is not evidence of a CAFA effect.”).

¹³⁰ Deborah Hensler made this observation a year before CAFA was enacted, as quoted in a legal news article: “The legislation will empower the larger, more nationally oriented firms’ at the expense of smaller firms practicing in state courts. She said she sees a trend in which large, well-financed plaintiffs’ firms will match the deep pockets and experience of their counterparts.” Michael Bobelian, *Congress Eyes Major Class Action Reforms*, N.J. L.J., Jan. 12, 2004, at 9.

¹³¹ *See id.* (“‘My practice, in a perverse way, will benefit,’ said Weiss, whose firm has extensive experience in federal courts and is in a strong financial position.” (quoting class action lawyer Melvyn Weiss)).

¹³² An FJC study of class action forum selection found that the tendency to file in state or federal court varies by lawyer:

Attorneys were asked about the percentage of their civil cases that they had filed in federal court in the past five years. Responses indicated that the probability of filing in state court generally varies in the same direction as the attorneys’ recent filing activity. Attorneys filing class actions in state court reported filing 30% of all their civil litigation in federal court in the past five years. Attorneys filing class actions in federal court reported filing 46% of their civil litigation in federal court.

Moreover, the post-CAFA horizontal shift in plaintiff-preferred jurisdictions yields winners and losers. The winners are firms with multiple offices to support a changing forum-selection strategy, and especially firms with established presences in the favored post-CAFA federal forums, which include the big cities of the Ninth, Third, and Second Circuits. Consider the advantage, in this regard, of the nation's largest class action firms. Coughlin Stoia has offices in San Diego, San Francisco, Los Angeles, New York, Boca Raton, Washington, Houston, and Philadelphia. Milberg Weiss has offices in New York and Los Angeles. Lieff Cabraser has offices in San Francisco, New York, and Nashville. Bernstein Litowitz has offices in New York, New Jersey, San Diego, and New Orleans. Hagens Berman has offices in Seattle, Chicago, Cambridge, Los Angeles, Phoenix, and San Francisco. By contrast, the Lakin Law Firm—the most frequent filer of pre-CAFA class actions in Madison County—has a single office in Wood River, Illinois.¹³³

The post-CAFA shift in claim selection likely favors the same firms as the shift in forum selection. A move from personal injury claims to economic injury claims, as well as a move toward more federal question class actions, favors firms with greater experience in commercial disputes, economic loss analysis, and federal law claims, which generally means the larger law firms.

Shifting class actions from state court to federal court affects class counsel in another way. It increases the likelihood of a single lead counsel or committee, rather than multiple class counsel or committees in multiple courts. When related class actions are pending in

Willing & Wheatman, *supra* note 92, at 614; cf. Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 230 (2001) (describing stratification within the plaintiffs' bar and changes "at the top end of the spectrum").

¹³³ Another leading filer of Madison County class actions before CAFA was the six-lawyer firm of Freed & Weiss. See McCann, *supra* note 3, at 8 ("To proponents of class-action reform, Weiss is the enemy, an attorney who they say enriches himself and hurts the business community while his clients receive coupons or relatively small cash awards. Weiss also is a leading class-action attorney in downstate Madison County, which national business groups hold up as a poster county for 'jackpot justice' and the abuse of class-action lawsuits."). Freed & Weiss's sole office is in Chicago. In contrast to other big-city office locations such as Los Angeles, San Francisco, New York, and Philadelphia, the city of Chicago—located in the class-unfriendly Seventh Circuit—holds less advantage for post-CAFA class action specialists. The advantage of an Illinois office had always depended on the ability to pursue class actions in state court, whether in Cook County or in southern Illinois; nearly all of the successful class actions listed on the Freed & Weiss website "Results" page were filed in Madison and St. Clair counties. See Freed & Weiss, LLC—Class Actions, <http://www.freedweiss.com/results.htm> (last visited Apr. 15, 2008).

multiple state courts, no mechanism currently exists to gather the cases before a single court.¹³⁴ By contrast, when related class actions are pending in multiple federal district courts, they can be transferred to a single federal district court for coordinated pretrial proceedings under the multidistrict litigation (MDL) statute.¹³⁵ The MDL judge may address class certification and appointment of class counsel on a consolidated basis. MDL, combined with the amended Rule 23(g) requirement of appointment of class counsel, increases the attention paid to the appointment of class counsel, and substantially decreases the chance of multiple firms going forward with their own overlapping or related class actions in multiple courts. One would expect this environment to favor firms with stronger national reputations, experience, and connections, rather than firms with a more local presence.

In 1995, class action opponents won legislation aimed at reducing class action abuse and driven by a mistrust of class action lawyers. Indeed, some say the legislation was aimed at bringing down the leading class action lawyers. The PSLRA tightened controls on mistrusted class action lawyers through tougher pleading requirements and an altered counsel selection process, while leaving the basic class certification standard intact. Far from bringing the downfall of leading class action firms, however, the statute had the opposite effect. Both the pleading standard and the counsel selection process made it difficult for weaker firms to compete, and worked to the advantage of the plaintiffs' firms with the greatest resources.

Ten years later, class action opponents won legislation aimed at reducing class action abuse and driven by a mistrust of class action lawyers. CAFA expanded federal jurisdiction over class actions, presumably providing a more vigilant set of monitors, and imposed additional constraints on class action lawyers, while leaving the basic class certification standard intact. Like the PSLRA before it, CAFA appears likely to strengthen the leading class action firms, while marginalizing weaker ones.

¹³⁴ See UNIF. TRANSFER OF LITIG. ACT § 201, 14 U.L.A. 677 (1991) (proposing a uniform state statute to allow consolidation of actions pending in multiple state courts); see also Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897, 905-06 (1994) (comparing potential approaches to interstate consolidation); Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 268 (1994) (discussing the possibility of states adopting the Uniform Transfer of Litigation Act).

¹³⁵ 28 U.S.C. § 1407 (2000).

CAFA has driven more class action litigation into federal court, where the larger firms generally have more experience. It has altered the forum-selection game so that the forums favored by class action plaintiffs are not the “magnet jurisdictions” of the pre-CAFA era, but the federal district courts in Los Angeles, San Francisco, New York, and Philadelphia, where the larger firms have offices. It appears to have brought a reduction in personal injury class actions, with which smaller firms may have more experience, and an increase in contract, fraud, and labor class actions involving economic harm. Finally, by bringing more class actions into federal court, with the availability of MDL transfer and the Rule 23(g) process for appointment of class counsel, CAFA increases the likelihood of a single proceeding for naming lead counsel. While CAFA was the product of lobbying from class action opponents, not class action lawyers, the early data on its effects suggest that once again, the leading class action firms may come out on top.

D. CAFA's Impact on Nonclass Litigation

CAFA's proponents hoped¹³⁶—and its opponents feared¹³⁷—that the Act would reduce class certifications. Whether by exacerbating choice-of-law problems in national market cases, creating class action docket pressures in federal courts, or removing questionable class actions from certification-friendly state courts, CAFA was widely expected to make class certification more difficult. It is too early to evaluate the accuracy of these predictions, given the time lag between commencement of an action and the class certification decision.¹³⁸ The next phase of the FJC's empirical study will shed light on post-

¹³⁶ See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. (2008) 1823, 1864 (“The conviction that animated most of CAFA's supporters was that the federal courts were much less likely to certify suits as class actions than were state courts and that denials of certification would, one way or another, quickly and abruptly end many, if not most, of them.”).

¹³⁷ See Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. (forthcoming 2008) (manuscript at 13-15, on file with author) (arguing that by applying federal jurisdiction but not federal substantive law or choice of law to national market cases, CAFA renders class certification unlikely); *Class Action Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 12-13 (2002) (statement of Thomas J. Henderson, Chief Counsel, Lawyers' Committee for Civil Rights Under Law) (raising a concern that docket constriction in federal court would create pressure to deny class certification) (quoted in Lee & Willging, *supra* note 74, at 1742).

¹³⁸ CAFA applies only to class actions commenced on or after February 18, 2005. The class certification decision often occurs well after commencement of an action.

CAFA class certification patterns.¹³⁹ Given the adjustments class action plaintiffs' lawyers have made in forum selection¹⁴⁰ and claim selection,¹⁴¹ CAFA may have a smaller impact on class certification rates than many expected. Nevertheless, in the context of analyzing CAFA's impact on mass litigators, it is worth asking how a decrease in class certification might play out.

One of the important lessons of recent mass litigation is that, with the notable exception of small-claims class actions, lawyers often find ways to litigate and settle mass disputes on a collective basis regardless of whether any court grants class certification.¹⁴² Lawyers achieve economies of scale by representing large numbers of similarly situated clients and coordinating with other counsel. They litigate on behalf of the group, pursuing collective interests, and they negotiate aggregate deals that often resemble class action settlements.¹⁴³ If CAFA reduces class certifications as expected, then it is likely to increase the number of claims resolved on a mass nonclass basis. One irony of CAFA, then, could be that a statute driven by mistrust of lawyers and aimed at enhancing judicial supervision may actually reduce the level of supervision over the litigation and resolution of mass disputes.¹⁴⁴

In class actions, multiple law firms sometimes compete for position,¹⁴⁵ and courts are empowered to appoint class counsel.¹⁴⁶ The

¹³⁹ FJC PROGRESS REPORT, *supra* note 77, at 1-3.

¹⁴⁰ See *supra* Part III.A.

¹⁴¹ See *supra* Part III.B.

¹⁴² See Erichson, *Beyond the Class Action*, *supra* note 69, at 530-43 (exploring various forms of nonclass collective litigation and settlement, and their similarities to class actions); Erichson, *Mississippi Class Actions*, *supra* note 69, at 287-96 (showing the extent of mass aggregate litigation in Mississippi despite that state's lack of a class action rule).

¹⁴³ See generally Erichson, *Beyond the Class Action*, *supra* note 69 (describing mass collective representation); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (describing collective negotiation and group settlements).

¹⁴⁴ In non-class actions, courts generally lack authority to decide which lawyers may represent a mass of plaintiffs, how much compensation the lawyers receive, and whether a settlement is fair, whereas class actions trigger judicial supervision over all of these matters. See FED. R. CIV. P. 23(e) (requiring court approval of class action settlement); FED. R. CIV. P. 23(g) (requiring judicial appointment of class counsel); FED. R. CIV. P. 23(h) (regulating judicial awards of class counsel fees); see also FED. R. CIV. P. 23(a)(4) (requiring a finding of adequate representation as a prerequisite for class certification).

¹⁴⁵ See generally *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMPLE L. REV. 689 (2001), reprinted in 208 F.R.D. 340 (2002) (analyzing district court judges' policies toward selection of class counsel nationwide).

¹⁴⁶ FED. R. CIV. P. 23(g).

coordinating power of federal courts magnifies the class counsel appointment decision, and can be expected to favor lawyers with greater resources, reputations, and networks.¹⁴⁷ In nonclass mass litigation, lawyers make similar plays for position. Rather than the appointment of class counsel, nonclass litigation involves appointment of lead and liaison counsel and steering committees in multidistrict litigation and statewide consolidated proceedings, and may involve attempts by leading plaintiffs' lawyers to negotiate nonclass settlements on behalf of claimant populations much broader than the lawyers' own clients. Judges anxious to accomplish comprehensive resolutions of mass disputes, even in litigation uncertifiable as class actions, abet counsel by instigating global settlement talks and by lending the court's imprimatur to an aggregate settlement.¹⁴⁸ Just as post-CAFA class action practice appears skewed in favor of the strongest firms, nonclass mass litigation favors the dominant players on the plaintiffs' side. Thus, even if CAFA proves to reduce class certifications, sending more litigation into nonclass aggregation, it may have a similar effect.

CONCLUSION

CAFA's proponents were right about at least one thing: CAFA appears to have effected a marked shift in class action activity from state courts to federal courts. Maybe they were correct as well in expecting federal courts to supervise class actions more rigorously than some state courts, although the statute's impact on class certifications and settlements remains to be seen.

What many of CAFA's proponents probably failed to anticipate, however, is the resilience of class action lawyers, the ways in which lawyers adapt to jurisdictional reform, and the follow-on effects of such adaptations. The expansion of federal jurisdiction does not simply shift cases to federal court by removal from plaintiff-selected state courts; it fundamentally changes the forum-selection game. Post-CAFA class action forum selection, early data suggest, favors federal courts in Los Angeles, San Francisco, New Jersey, Philadelphia, and New York—a far cry from such pre-CAFA magnet jurisdictions as Madison County, Illinois, and Beaumont, Texas. Nor does the expansion of federal jurisdiction simply shift the forum for the same set of

¹⁴⁷ See *supra* text accompanying notes 134-135.

¹⁴⁸ Noteworthy recent examples include Judge Jack Weinstein in the Zyprexa litigation, *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596 (E.D.N.Y.), and Judge Eldon Fallon in the Vioxx litigation, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La.).

claims; it alters the balance of litigation. There seems to have been a shift away from personal injury class actions and a growth in contract, fraud, wage-and-hour, and consumer protection cases. As CAFA's impact plays out, there will be winners and losers, and seasoned class action observers may experience a bit of *déjà vu*. Just as a decade ago the PSLRA's pleading reform and lead plaintiff reform surprised its promoters by strengthening the dominant class action firms, CAFA's jurisdictional reform now appears poised to have a similar impact.

What, if anything, does this mean for whether CAFA should be considered a success? The answer depends on how one perceives CAFA's objectives. If CAFA's proponents expected it to squelch class actions, the statute appears unlikely to achieve that goal. Similarly, if CAFA's proponents expected the statute to disempower the class action bar or its most powerful members, they are in for disappointment. But if the point was to deprive class action plaintiffs of their favorite state court forums and to reduce the franchise of class action lawyers with forum-dependent practices, then the statute appears to be succeeding.

CAFA tempers forum selection. Class action plaintiffs are less likely to avail themselves of anomalously plaintiff-friendly or class-friendly state forums, but federal forum selection by class action plaintiffs' lawyers ensures that neither can defendants depend upon particularly class-skeptical federal forums. Like other recent class action reforms, CAFA neither alters the standard for class certification nor asserts any intent to undermine class actions. Indeed, the statute purports to support class actions as an "important and valuable part of the legal system."¹⁴⁹ CAFA's proponents spoke instead of class action abuse by unscrupulous lawyers and state judges willing to certify marginal class actions and willing to approve exploitative settlements. While its ultimate impact on certifications and settlements remains to be seen, the statute's effect on forum selection is already apparent. Given the adaptations of class action lawyers, however, the statute appears unlikely to obliterate class actions or to diminish the power of the elite class action bar. In other words, CAFA may be achieving its stated objective while failing to achieve an unstated agenda.

¹⁴⁹ CAFA § 2(a)(1), 28 U.S.C. § 1711 note (Supp. V 2005); *see also id.* § 2(b)(1) (stating that a purpose of the act is to "assure fair and prompt recoveries for class members with legitimate claims"); *supra* note 30 and accompanying text (quoting President Bush on the "valuable purpose" served by class actions).

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